

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

IN RE)	
)	
KENNETH SCOTT BOOHER and)	Case No. 99-02772
SHERRI LEE BOOHER)	
)	
Debtors.)	MEMORANDUM OF DECISION
)	AND ORDER
)	
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HONORABLE TERRY L. MYERS, UNITED STATES BANKRUPTCY JUDGE

Stephen W. French, Boise, Idaho, for Debtors.

David Pawlowski and Troy A. Hall, San Diego, California, for PSB Lending.

John H. Krommenhoek, chapter 13 Trustee, Boise, Idaho.

The chapter 13 debtors, Kenneth and Sherri Booher (“Debtors”) filed on April 18, 2000 their proposed “First Amended Chapter 13 Plan” (the “Plan”). The Plan came on for confirmation hearing on that date¹, and counsel for the Debtors presented argument in favor of confirmation.

¹ Having a hearing the same day as a plan is filed seems contrary to the notice requirements of Fed.R.Bankr.P. 2002(b). However, it was represented that the amendments to the plan, previously noticed properly for hearing, reflected only resolution of certain open issues and that, other than the creditors directly involved in such settlements, no creditors were adversely affected. Thus, further notice was alleged to be unnecessary.

The Court took under advisement questions regarding the Debtors' proposed treatment of a secured creditor, PSB Lending Corporation ("PSB"). PSB has an outstanding objection to confirmation, but did not appear at the April 18 confirmation hearing. Hearing on confirmation was continued to May 16, in the event it was required.

The standing chapter 13 trustee ("Trustee") was offered a period of time in which to file a written objection or statement concerning the PSB issues, but has not availed himself of that opportunity. In fact, the Trustee has now endorsed a proposed order of confirmation, as has PSB. This order, if entered, would obviate the need for the May 16 hearing.

Upon consideration of the issue presented, the Court determines that confirmation would be inappropriate, even with the consent of the Trustee and PSB. Confirmation of the Debtors' Plan will therefore be denied.

BACKGROUND

The Debtors' schedules indicate that PSB has a second position deed of trust on their residence. The Debtors allege that this debt, of approximately \$39,000, is fully unsecured. The original October, 1999 Plan provided:

PSB Lending - has a promissory note and deed of trust which is a second mortgage against Debtors' residence which this chapter 13 Plan proposes to strip from the residence and render this creditor unsecured upon confirmation of this Plan. The value of the debtors' residence is approximately the same as the amount owed to the first lien holder.

This proposed treatment is made in reliance on *In re Lam*, 211 B.R. 36 (9th Cir. BAP 1997), appeal dismissed 192 F.3d 1309 (9th Cir. 1999), which held that fully unsecured junior mortgage debts on residences could be modified notwithstanding § 1322(b)(2).²

PSB objected to the original Plan's treatment alleging that strip-off was prohibited by § 1322(b)(2), that the attempt to adjudicate the matter by motion was contrary to Rule 7001, and that there was in fact equity in the property over the debt owed the first position secured creditor and thus PSB was not fully unsecured but only undersecured.

For awhile it appeared that the matter would proceed to decision through an adversary proceeding prosecuted by the Debtors simultaneously with their confirmation efforts. On April 18, that approach changed. The Plan now provides:

PSB Lending - has a promissory note and deed of trust which is a second mortgage against Debtors' residence which this chapter 13 Plan proposes to pay outside the Plan per yet to be determined agreement between the Debtor and PSB Lending.

DISCUSSION

PSB apparently now accepts the Plan as amended, since it has endorsed the Debtors' proposed order. That order indicates only that "[t]he payment to PSB Lending shall be made outside the plan." Although it appears Debtors and PSB have reached an agreement that something is to be paid, neither the proposed payment amount nor any other term or aspect of the treatment of PSB's claim "outside" the Plan is set forth in the order, the Plan, or in any other pleading. However, the Plan's

² *Lam* has not been universally embraced. See, *In re Enriquez*, 244 B.R. 156 (S.D. Cal. 2000); *In re Ortiz*, 241 B.R. 460 (Bankr. E.D. Cal. 1999).

treatment of all creditors must be sufficiently specific in order for the Court to make the findings required by the Code. For example, without knowing the details of the treatment of PSB's claim, the Court cannot find that the plan is feasible, § 1325(a)(6), or that the Plan comports with the requirements of the Code, § 1325(a)(1). The Court cannot test, when facts are concealed from view, the good faith of the proposal. § 1325(a)(3). Perhaps most importantly, the Court is asked now to turn a blind-eye toward legitimate issues, still unresolved, of which it has already been made aware. It cannot make, on the record presented, a reasoned determination on the propriety of the treatment of PSB's claim in light of the § 1322(b)(2) issues which have previously been raised.

The parties' suggested approach doesn't actually resolve but, rather, perpetuates the *Lam* issue framed by the Debtors' Plan and PSB's objection. Indeed, the apparent settlement complicates it since the Debtors propose to pay something to PSB "outside" the Plan.³ Apparently the Debtors agree that some portion of their obligation to PSB is secured, but an undersecured mortgage creditor's claim cannot be stripped down, even under *Lam*. § 1322(b)(2). On the other hand, if PSB is indeed entirely unsecured, then payment outside the Plan yields more to it than other unsecured creditors, and § 1322(a)(3) and § 1322 (b)(1) are violated unless the discriminatory treatment is justified.⁴

CONCLUSION

³ "Outside the plan" is shorthand for a debtor making payments to the creditor(s) directly rather than through the trustee. § 1326(c). It does not empower debtors to make secret deals "outside" the plan process.

⁴ Thus, contrary to the representations at hearing, there would appear to be a need for notice to all creditors.

Confirmation of this Plan, either with its “agreement to agree” provision or with a *sub rosa* settlement, is improper. Although the parties suggest otherwise, this Plan may not be confirmed. The record fails to establish compliance with § 1325(a)(1), § 1325(a)(3) and § 1325(a)(6), and in all likelihood the Plan violates either PSB’s rights under § 1322(b)(2) or the rights of other creditors under § 1322(a)(3) and § 1322(b)(1). Confirmation is DENIED.

Dated this 12th day of May, 2000.